ANNUAL PLANNING & ZONING CONFERENCE

April 12, 2003

Sponsored by the New Hampshire Office of State Planning

2003 LAND USE LAW UPDATE

Presented by

Timothy Bates, Esquire

of

MITCHELL & BATES, PROFESSIONAL ASSOCIATION
25 Beacon Street East
Laconia, New Hampshire 03246

(603) 524-3885 C (800) 785-7409 C Facsimile 524-0745

e-mail: ***townlaw@metrocast.net***

TABLE OF CONTENTS

SUPREME COURT CASES

NEW HAMPSHIRE SUPREME COURT OPINIONS

HOW MUCH IN*VEST*MENT DOES IT TAKE TO BECOME VESTED?

***AWL Power, Inc. v. City of Rochester*, _____** N.H. _____ (December 9, 2002)

In August, 1987, the Rochester Planning Board approved a development plan for about 24 acres that would create 18 single family homes and a 59-unit condominium. The approval was subject to the condition that the developer construct a number of public improvements on the property, including a sidewalk, a sewer line extension, a fence and a road.

About a year after the planning board's approval, the zoning ordinance was amended, which rendered the proposed condominium and many of the unbuilt single-family houses nonconforming. The city, however, allowed the developer to continue the development according to the 1987 approved plan. During the 3 years that followed the approval, the developer built 6 of the 18 houses, and spent slightly over $200,000 on the public improvements, finishing the sidewalk and sewer line construction; it also paid the city a $50,000 impact fee for off-site improvements.

The parties in this case did not dispute that the original developer met the requirements of RSA 674:39 which grants a four-year exemption from subsequently enacted zoning restrictions, running from the date of recording of an approval, provided the builder begins "active or substantial development" on the property within 12 months of the approval. The parties thus agreed that the city could not have blocked the developer's proposed construction under the amended zoning ordinance until at least August, 1991 (4 years from the original approval).

In 1990, all construction ceased on the site because of the downturn in the real estate market, and the developer did not seek to resume construction for 10 years. In April, 2000 the developer notified the city of its intention to finish the project. In response, the city reviewed the project and determined that the developer had completed 43.2 percent of the required public improvements, and 10.7 percent of all the combined public and private improvements. Based on this study, and following a public hearing, the planning board found that the developer's right to complete the project had not vested, and that the changes in the zoning ordinance, no longer stayed by the statutory four-year exemption, barred the completion of the project. Based on this finding, the planning board revoked the 1987 project approval.

The developer appealed to the superior court, arguing that the right to complete the project had vested and could not be revoked. The superior court compared the $200,000 that had been spent on the public improvements to the projected cost of the entire development which was almost $6,500,000. Without taking into account the completion of the 6 houses, the court concluded that the developer had completed only about 3% of the project, and agreed with the planning board that this small percentage

was insufficient to constitute the "substantial construction" necessary to vest the right to complete the project under the common law standard articulated in the case of *Piper v. Meredith*, 110 N.H. 291, 299 (1970).

Test to Determine "Substantial Construction" is Absolute, Not Relative (Sometimes)

On appeal, the supreme court ruled that the trial court had used the wrong approach in considering what percentage of the overall project had been completed before the zoning ordinance was amended. The court outlined the following three bases for its rejection of the "percentage of completion approach" to vesting:

1. Prior cases do not support the "percentage of completion approach"

The court looked at some of the earlier cases about vesting and pointed out that "we have never held that completion of a certain percentage of construction is the exclusive method by which the rights of a developer may vest, and that in the case of Piper v. Meredith, 110 N.H. 291, 299 (1970) the court had gone out of its way to declare that "each case presents a question of fact peculiar to its own set of circumstances."

2. The "percentage of completion approach" conflicts with the common law rationale for vesting

The court said that common law vesting rights stem from the developer's good faith reliance upon the absence of land use regulations that prohibit the project, and for that reason courts should be liberal about how and when such "good faith" vested rights are created. Against this liberal approach, the supreme court clearly felt that the superior court had simply set the vesting bar too high by using the "percentage of completion approach."

3. The "percentage of completion approach" would lead to anomalous results

Finally, the supreme court said that the "percentage of completion approach" would unfairly burden developers with large or complex plans compared to smaller projects. The court noted that

> "In fact, the city's application of this standard has already led to disparate results. At about the same time it considered this case, the city determined that another developer, who had spent no more than $143,000 on his approved plan, had acquired a permanent, vested right to complete his project. The rationale for this decision was that the total cost of the other developer's project was only several hundred thousand dollars, and that the construction completed by the developer thus constituted a substantial percentage of the total. While consistent with the reasoning used by the city and trial court in this case, the trial court's standard places as much emphasis on the size of the overall project as it does on the actual

reliance of the developer. We thus hold that the superior court erred as a matter of law in interpreting the "substantial construction" standard."

Thus, the supreme court concluded that the correct standard to determine whether "substantial construction" has occurred will take into account not only construction measured against the entire plan, but also whether the amount of completed construction is *per se* substantial in amount, value, or worth. The court agreed with the developer that its expenditure of over $200,000 on public improvements and construction of six houses was enough to meet the "substantial construction" standard in this case.

The court also clearly left the door open to apply the "percentage of completion approach" to the vesting of smaller projects where good faith expenditures might not seem *per se* substantial. However, the main point is that "in cases where construction expenditures amount to large sums, construction need not be judged by comparison to the ultimate cost of the project."

Vesting Will Not Always Depend Only on Public Improvements

The supreme court rejected the developer's argument that vested rights should depend only on whether the developer has made "significant expenditures" on the public improvements to the land. The court said that while it is possible that a developer may acquire vested rights solely by the construction of public improvements, that will happen only if the construction was "substantial" and not merely because it constituted a certain percentage of the total public improvements.

What Good is The Vesting Statute, RSA 674:39?

Last, the developer had argued that the four-year vesting statute, RSA 674:39, establishes a standard for the acquisition of vested rights that is easier to meet than the standard developed over the years as the court has decided cases such as *Piper v. Meredith* (the common law). The court disagreed with this, confirming its earlier ruling in *Morgenstern v. Town of Rye*, 147 N.H. 558, 563 (2002) that the test for vesting under the statute and at common law is the same.

Indeed, the court pointed out that the principal benefit of the vesting statute for developers is that it provides a developer with additional time (four years) to meet the common law vesting standard of having completed "substantial construction" of the project -- the statutory four years becomes available to the developer if she begins "active or substantial" construction within one year of the approval of the project. The statutory protection is significant; recall that at common law even an approved project could be stopped dead in its tracks if a subsequent land use amendment prohibiting the project was enacted before common law vesting had occurred.

FOUR-YEAR EXEMPTION UNDER RSA 674:39 APPLIES TO IMPACT FEES

***R.J. Moreau Companies, Inc. v. Town of Litchfield*,**
_____ N.H. _____ (December 24, 2002)

The plaintiff in this case owns lots in two subdivisions in Litchfield. Final subdivision approvals were recorded at the registry of deeds on October 13, 1999 and August 17, 2000.

The town had an impact fee ordinance that applied to the lots in those subdivisions, for the purpose of offsetting the increased demand on municipal facilities and schools caused by residential development. Under the ordinance, the impact fee schedules could be reviewed and revised periodically by the town's planning board, subject to the approval of the board of selectmen.

At the time the two approved plans were recorded the amount of the impact fee was $.91 per square foot. On March 14, 2000 the town amended its ordinances to authorize the planning board to modify its method of calculating the amount of the impact fees, and on August 22, 2000 the planning board adopted a new impact fee schedule set at $3.801 per square foot of living area, more than four times the original fee. The selectmen approved the new schedule on August 28, 2000, effective immediately.

When the developer subsequently applied for building permits for its lots, the town required it to pay impact fees under the new schedule. The developer paid the new fees, but appealed to the planning board and then to the superior court, arguing that the four-year exemption from zoning changes under RSA 674:39 protected it from having to pay the higher fees because the subdivision plans were approved and recorded before the new fee schedule became effective. The superior court agreed with the developer, as did the supreme court when the town appealed.

On appeal, the supreme court first noted that the authority to adopt "innovative land use controls" such as impact fees derives not from its general police or taxing power, but from its statutory power to enact zoning ordinances under RSA 674:16, II and RSA 674:21. Moreover, RSA 674:39 provides, in relevant part:

> Every plat or site plan approved by the planning board and properly recorded in the registry of deeds shall be exempt from all subsequent changes in subdivision regulations, site plan review regulations, and zoning ordinances adopted by any city, town, or county . . . except those regulations and ordinances which expressly protect public health standards, such as water quality and sewage treatment requirements, for a period of 4 years after the date of the recording . . . provided that:

> I. Active and substantial development or building has begun on the site by the owner or the owner's successor in interest in accordance with the approved plat within 12 months after the date of approval . . .

The supreme court rejected the town's argument that the protection afforded by the statute should be limited to changes to land use ordinances (or entirely new ordinances) that have the effect of prohibiting completion of the development in accordance with the approved plans -- impact fees do not prohibit a project's completion but are merely additional costs imposed on a developer. Instead, the court ruled flatly that "RSA 674:39 plainly encompasses all zoning ordinances, whether or not they will have the effect or purpose of stopping an approved project. If the legislature had wanted to exempt impact fees from the reach of RSA 674:39 (as it did for ordinances which expressly protect public health standards, such as water quality and sewage treatment requirements) it could have included them in the statutory exceptions."

The supreme court's opinion is not exactly as straightforward as it may seem. I am one of at least a handful of municipal lawyers who saw (and still see) strong arguments in support of Litchfield's position, not the least of which is the clear language in RSA 674:39 that it protects the "improvements as shown on the plat" from subsequent changes in land use ordinances. Since impact fees that are first enacted or increased after the approval and recording of a development plan do not require any changes to such protected improvements, the court could have persuasively reasoned that the statute does not interfere with such fees. Also of consequence to this line of reasoning is the declaration in RSA 674:21, V that an impact fee is "a fee or assessment imposed upon development." As such, impact fees are in the nature of a tax, and you can be confident that the courts are not going to protect approved developments from later increases in property taxes, sewer assessments and the like!!

Practice Pointer: Because the supreme court has ruled that impact fees are treated just like a "normal" zoning restriction for purposes of the "grandfathering" provided under RSA 674:39, you may run into a situation where the four-year protection has expired without the project having acquired vested rights to be forever free from later changes to the zoning ordinance. For example, you might have a case like *AWL Power v. City of Rochester* (December 9, 2002), reported above, with the difference that the developer stopped work for many years after it did not complete "substantial construction" within the four-year protected period so as to gain vested rights (or, maybe the developer never did start "active and substantial" development within 12 months of approval, so the project never even had the benefit of the four-year exemption in the first place). On those facts, if the project is later restarted (and is allowed to go forward because the substantive land use regulations still allow it) it would be subject to impact fees that were first adopted or increased after the original approval was granted.

SUPREME COURT WASN'T JOSHING WHEN IT RELAXED THE UNNECESSARY HARDSHIP STANDARD TO OBTAIN A ZONING VARIANCE!!

Rancourt v. City of Manchester, _____ N.H. _____ (January 10, 2003)

And you thought the court was kidding when it decided *Simplex Technologies, Inc. v. Town of Newington*, 145 N.H. 727 (2001)? The *Rancourt* case is the first time the supreme court has dealt squarely with the unnecessary hardship test since it announced the new standard in *Simplex,* and there is no doubt that the new "unnecessary hardship" test is very different from the old.

The plaintiffs are abutters to residential property in Manchester owned by Joseph and Meredith Gately. The Gatelys contracted to have a single-family home built on their 3-acre lot. The Gatelys also wished to build a barn to stable two horses on 1 ½ acres located in the rear part of the lot, but livestock, including horses, are prohibited in that district under the zoning ordinance. The Gatelys applied for a variance to allow the horses, which was granted by the ZBA. The angry abutters first appealed to the superior court, which affirmed the grant of the variance, and then to the supreme court, which also affirmed.

The supreme court first noted that in *Simplex* "we departed from our traditionally restrictive approach to [unnecessary hardship] . . . We thus adopted an approach that was more considerate of a property owner's constitutional right to use his or her property." The court went on to restate the *Simplex* unnecessary hardship test as follows:

> Under Simplex, to establish "unnecessary hardship," an applicant for a variance must show that:
>
> (1) a zoning restriction applied to the property interferes with the applicant's reasonable use of the property, considering the unique setting of the property in its environment;
>
> (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and
>
> (3) the variance would not injure the public or private rights of others.

The court summed up the new test by stating that applicants for a variance no longer must show that the zoning ordinance deprives them of any reasonable use of the land. Rather, they must show that the use for which they seek a variance is "reasonable," considering the property's unique setting in its environment.

The court noted that the statutory basis for variances, RSA 674:33, I(b) requires that "special conditions" must be present, and pointed out that before *Simplex*, unnecessary hardship "existed only when special conditions of the land rendered it uniquely unsuitable for the use for which it was zoned." After Simplex, "hardship exists when special conditions of the land render the use for which the variance is sought "reasonable." Thus, in the first prong of the *Simplex* test, "special conditions" are

referred to as the property's "unique setting . . . in its environment." I think the court means by this that there are always "special conditions" present, being each property's unique setting in its environment. The first prong of the new hardship test thus looks at whether the proposed use is "reasonable" given that unique setting.

The facts in this case showed that the Gately's lot was located in a country setting, that it was larger than most of the surrounding lots, was uniquely configured in that the rear portion of the lot was considerably larger than the front, and that there was a thick, wooded buffer around the proposed paddock area. In short, the supreme court agreed that both the ZBA and the trial court could logically have concluded that these "special conditions" (i.e., the property's unique setting in its environment) made the proposed stabling of two horses on the property "reasonable."

In the hope that it will be of some continuing use, I have retained in these materials the following discussion of the *Simplex* case itself.

SUPREME COURT CREATES NEW TESTS TO DETERMINE WHETHER "UNNECESSARY HARDSHIP" EXISTS TO JUSTIFY GRANT OF VARIANCE!!

Simplex Technologies, Inc. v. Town of Newington**,** 145 N.H. 727 (2001)

In this case, the supreme court has radically changed the legal definition of what constitutes the "unnecessary hardship" that must be found to allow the Zoning Board of Adjustment to grant a variance from a zoning ordinance. The other four variance criteria remain nominally unaffected by the decision, although some elements of each of those other criteria seem to be inherently part of the analysis ZBA's will have to undergo as they apply the new hardship tests.

For decades, for unnecessary hardship to exist, the applicant for a variance in New Hampshire had to show that unless the variance were granted, there would be no reasonable use of the property allowed under the zoning ordinance. Now, the supreme court has decided to substitute a more relaxed test, effective immediately.

The new test for "unnecessary hardship" consists of 3 elements, and the applicant must meet each one. For "unnecessary hardship" to exist, the applicant must show

(1) that the zoning restriction as applied to the property interferes with the reasonable use of the property, considering the unique setting of the property in its environment;

(2) that no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and

(3) that the variance would not injure the public or private rights of others.

Let's look at each of these elements.

I. REASONABLE USE

A. General Approach

(1) the zoning restriction as applied to the property interferes with the reasonable use of the property, considering *the unique setting* of the property in its environment (emphasis added).

Under this element, the ZBA must consider the special circumstances of the particular parcel of land for which the variance is sought. It requires the applicant to show that the zoning restriction interferes with his or her "reasonable use" of the property. However, the ZBA must make that judgment, not in a vacuum, but *considering the unique setting of the property in its environment*.

Put another way, whether the proposed use of the property is reasonable depends to a large degree on the setting that surrounds the property. For example, if an applicant is seeking a use variance to allow a pig farm in a residential neighborhood, the ZBA may well conclude that the proposed use of the property is not reasonable considering *the unique setting* of the property in its environment. In such a case, the ZBA would therefore find that the zoning restriction (that prohibits pig farms in the zone) *does not interfere* with the reasonable use of the property, considering the unique setting of the property in its environment.

B. Must There Still Be Some Unique Characteristic of the Land That Distinguishes it from Other Parcels in the Area??

As background, recall that in the first place the statute that authorizes the ZBA to issue variances, RSA 674:33, I states that there must be "special conditions" which will result in "unnecessary hardship" if the restriction in the zoning ordinance is enforced against the property. Over many years of deciding variance cases, the supreme court took this "special conditions" requirement, transformed it into a rule that required an applicant for a variance to show that the property has a "unique" physical problem, and added the further hurdle that the effect of the unique condition of the land coupled with the zoning restriction at issue must be *to eliminate all reasonable use of the property*.

As Justice Souter wrote in his last New Hampshire supreme court opinion, an applicant for a variance must show that there is "some unique condition of the parcel of land distinguishing it from others in the area [which] bar[s] any reasonable use of the land consistent with literal enforcement of the ordinance." *Crossley v. Town of Pelham*, 133 N.H. 215, 216 (1990).

In my view, the courts have been somewhat disingenuous about the requirement that there be some "unique" characteristic that underlies the unnecessary hardship. By this I mean that when it suited the court to trot out the "unique" requirement aspect, as in the *Crossley v. Town of Pelham* case, it would do so. This would typically occur when the zoning restriction at issue *did not* cause the loss of all reasonable use of the

property anyway, so the court could safely recite the platitude about "uniqueness" almost as an aside ("By the way, many of the other properties in the area have the same problem the applicant's land has, so there's no "unique" condition that would justify the grant of the variance," the court would say in such a case).

On the other hand, when the zoning restriction ***really did*** cause the loss of all reasonable use of the property, the court would not waste any time examining whether there was a "unique" characteristic of the lot not shared by others in the area. For example, if a large number of small, non-unique waterfront lots would have trouble complying with the shorefront setback requirements, the court focused only on the "reasonable use" element, not on whether there was some problem unique to the particular lot at issue (because the problem was by no stretch of the imagination unique). See, e.g., *Husnander v. Town of Barnstead*, 139 N.H. 476 (1995).

I believe the first part of the new variance hardship test has, thankfully, done away with the sham that the applicant must show some "unique" physical condition of the parcel (keep in mind that "unique" is a pretty powerful word which requires an absolute, unmodified state, in spite of the manner in which the word is now routinely misused in speech and informal writing). I say this because of the background described above, and because of the plain language of the first part of the test, repeated here:

> (1) that the zoning restriction as applied to the property interferes with the reasonable use of the property, considering ***the unique setting*** of the property in its environment; (emphasis added.)

This language focuses the ZBA's inquiry on the ***setting*** of the property, and declares it to **BE** "unique" as a matter of definition. There is justification for this, in the common notion that every property in its setting ***really is*** "unique" -- there is no other parcel in the world in that setting, surrounded by those other properties that have those other characteristics.

So I believe that in this first part of the test the supreme court is telling us to examine whether the applicant's proposed use of the property (which is prevented by the zoning restriction at issue) is "reasonable" in light of the unique ***setting*** of that parcel, which will include inquiry into the nature of any existing uses in the surrounding neighborhood. I believe the requirement that the applicant show that there is some "unique" condition of the parcel that no other parcel shares has been assigned to the judicial dust bin, where it belongs. Only time will tell as variance cases are decided under the new hardship tests!!

II. FAIR AND SUBSTANTIAL RELATIONSHIP

> (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property

This element requires the ZBA to identify, in the abstract, the general purpose(s) of the zoning restriction for which the variance is sought. Why does the restriction exist in the first place? What purpose is it intended to achieve? Yes, it is true that the plain language of this test requires the ZBA to identify the general purposes of the entire zoning ordinance and then judge whether those purposes are advanced by the specific restriction in the ordinance that is causing the problem. However, I think this test may be more limited than the language suggests. I would argue that the more logical application of this test requires the ZBA to first identify the general purposes sought to be achieved by the specific restriction (not by the ordinance as a whole, which, of course, will have a host of general purposes, some of which may have little relationship to the specific restriction for which the landowner is seeking the variance).

Next, the ZBA should look at whether those general, abstract purposes are advanced when the zoning restriction is applied to the particular piece of property for which the variance is sought -- this "*as applied*" inquiry must also take into account the unique setting of the property in its environment, just like the first element of the hardship test.

Continuing the pig farm example, the *general purpose* of restricting a zone to residential use is to separate residential areas from non-residential uses that are deemed incompatible, and then to preserve the residential character of the zone once it is established. In most cases, it would be very difficult for an applicant who sought a variance to allow the pig farm to show that there is no fair and substantial relationship between the general purpose of allowing only residential uses in that zone, and the impact of that restriction on the applicant's specific property. That is so because in the "typical" case the restriction has exactly its intended effect when it is applied to the applicant's property: it preserves the integrity of an existing residential zone from the impact of incompatible, non-residential uses.

However, one can imagine a situation where there are a number of other farming uses in the neighborhood that are either "grandfathered," or were established as a result of earlier variances that were issued, so that there is already a strong presence of similar agricultural uses in the area where the applicant wishes to establish the pig farm. In such a case, the applicant may be able to show that there is no "fair and substantial" relationship between the general purpose of the zoning restriction that allows only residential uses, and the impact that restriction has on the applicant's property.

III. NO INJURY TO PUBLIC OR PRIVATE RIGHTS OF OTHERS

(3) the variance would not injure the public or private rights of others

This third and final element of the new hardship test requires the applicant to show that the proposal would not injure the public or private rights of others. This encompasses part of one of the four other parts of the variance test that requires the applicant to show that no diminution of surrounding *property values* will result from the grant of the variance. However, the new third element of "unnecessary hardship" is

broader than just property values. Indeed, the specific reference to the "private rights of others" raises the (scary!) possibility that the ZBA may now have to consider and actually rule on challenges to variances brought by opponents who claim that the proposed use is prohibited by private covenants in a deed, or because the boundary of the property is disputed, for example. We can only hope that the court did not mean to include that kind of dispute as within the issues that the ZBA must resolve, but only time will tell as new variance cases are decided.

In the meantime, and as a general matter, the ZBA should not be overly concerned about this third element of "unnecessary hardship" unless there is convincing evidence that there will be a significant decrease in surrounding property values, or some clear harm to public health, safety or welfare if the variance is granted.

IV. WHAT ABOUT THE OTHER FOUR PARTS OF THE VARIANCE TEST?

The applicant must still demonstrate that he or she meets the other four parts of the traditional variance analysis, although there are overlaps between each of those four parts and the new "unnecessary hardship" test. That is, the applicant must show

(1) that no diminution in the value of surrounding properties would occur (we've seen that this overlaps to some degree with the third element of the new "unnecessary hardship" test);

(2) that the proposed use would not be contrary to the spirit of the ordinance (overlaps with the second element of the new "unnecessary hardship" test);

(3) that granting the variance would not be contrary to the public interest (overlaps with the third element of the new "unnecessary hardship" test); and

(4) that granting the variance would do substantial justice (overlaps with the first element of the new "unnecessary hardship" test).

V. IS THE OLD "UNNECESSARY HARDSHIP" TEST GONE FOREVER?

As Bernie Waugh points out, probably not. It is possible to imagine a situation where, for example, the applicant could not meet the second element of the new test (because there is a fair and substantial relationship between the general purpose of the restriction and the effect that the restriction has on the applicant's property), but where because of special circumstances the zoning restriction leaves the applicant with no reasonable use of the land.

In such a case, the applicant is still entitled to the variance because without it the applicant's property would be effectively "taken" by the zoning restriction. It does not appear that the supreme court recognized this aspect of its *Simplex* decision!

RETROSPECTIVE APPLICATION AND THE *FISHER V. DOVER* TEST

I. RETROSPECTIVE APPLICATION

As explained in *Opinion of the Justices*, 131 N.H. 644, 649-650 (1989), under common theory, court decisions and opinions generally operate retroactively, unless the court decides that justice would be better served by limiting the change in the law to prospective application as it did in *First NH Bank v. Town of Windham*, 138 N.H. 319, 328 (1994) and finally did in *Thomas Tool Services, Inc. v. Town of Croydon*, (Slip Op. August 28, 2000)(amended February 1, 2001). It seems that the announcement of the new hardship tests in *Simplex* falls into the general category of changes that will operate retroactively.

Under the retroactive application of the new hardship test, several outcomes are possible, depending on whether the ZBA granted or denied the variance and, if the variance was denied, whether the ZBA grounded its decision on any of the other four prongs of the variance test which survived *Simplex*.

II. THE *FISHER V. DOVER* TEST

Does the holding in Simplex allow applicants who were denied variances in the past, and who have no pending appeal, to file a new application for the same use? Not surprisingly, the answer seems to be "It depends."

Under the holding in *Fisher v. City of Dover*, 120 N.H. 187, 190 (1980) a subsequent application for a variance where the first one has been finally denied may only go forward where (1) a material change of circumstances affecting the merits of the application has occurred; or (2) the second application is for a use that materially differs in nature and degree from its predecessor.

It seems clear that the announcement of the new tests for unnecessary hardship *Simplex*, to be applied retroactively, constitute such a "a material change of circumstances affecting the merits of the application," *where the prior application was denied solely on the grounds that the applicant failed to meet the now defunct unnecessary hardship test*. In contrast, it is hard to see how the new hardship test could rise to the level of a material change of circumstances affecting the merits of the application if the ZBA based its denial on one or more of the four "old" tests that survive *Simplex*; in such a case, I suggest that there is a change of circumstances, but that the change is *not material* to the outcome of the prior variance application.

SELF-CREATED HARDSHIP IS MERELY ONE FACTOR TO CONSIDER UNDER NEW VARIANCE TEST FOR UNNECESSARY HARDSHIP

Hill v. Town of Chester, 146 N.H. 291 (2001)

In 1997 the Hills bought a 1.3 acre parcel from family members for $40.00 (yes Virginia, that's "forty dollars"); the lot was part of a larger parcel owned by the family trust, and title would go back to the trust if the Hills didn't build a house on it within five years.

The lot lacked the minimum lot size and frontage now required under the zoning ordinance (although the lot had been taxed by the town as a buildable lot), and the ZBA denied a variance, partly on the grounds that there was no unnecessary hardship because the trust could have adjusted the size and frontage of the lot to comply with the ordinance -- the hardship was thus not "unnecessary," but "self-created." The superior court reversed the ZBA, ruling that because the lot was taxed as buildable (until the variance was denied!!) the plaintiffs had no actual or constructive knowledge that the land was nonbuildable at the time they purchased it, and that the hardship was not self-created. The supreme court ruled in favor of the town, sort of.

Taxable Status; Knowledge of Zoning Restrictions

The supreme court breezed through these two issues (the superior court was wrong on both) by repeating the rule that the method by which a town taxes land is not dispositive in determining zoning questions (although it is one factor that can be considered, and might determine the outcome of a close case on bad facts); see *Mudge v. Precinct of Haverhill Corner*, 133 N.H. 881 (1991). Also, landowners are deemed to have constructive notice of the zoning restrictions that are applicable to their property (which means the law will assume the landowner has read the zoning ordinance even if she hasn't); *Trottier v. City of Lebanon*, 117 N.H. 148 (1977).

Self-Created Hardship and the New Simplex Hardship Tests

The court then clarified its holding in *Ryan v. City of Manchester*, 123 N.H. 170 (1983), by ruling that it is "implicit" in *Ryan* that a self-created hardship does not automatically disqualify the person from receiving a variance, rather, "it is just one factor to consider."

Moreover, the court expressly declared that the self-created hardship factor should be considered under the first prong of the hardship test set forth in the *Simplex Technologies* case.

That first prong requires the applicant for a variance to show that the "zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment." Thus, if the zoning restriction that interferes with the proposed use comes into play because of self-created circumstances, that fact will certainly have an influence on whether the ZBA considers the proposed use to be "reasonable." This factor comes into play not only where the landowner has made some physical change to the property which creates the need for the variance, but also where a landowner purchases property with a perfectly

obvious limitation that makes it unsuitable for the intended use under the zoning ordinance.

ONLY AN UNCONSTITUTIONAL LAND USE ORDINANCE WILL LEAD TO AN AWARD OF MONEY DAMAGES FOR A "TAKING"

Torromeo v. Town of Fremont and ***MDR Corp. v. Town of Fremont***, _____ N.H. _____ (December 13, 2002)

These two cases eventually became joined at the hip, but started out life as separate challenges to the Town of Fremont's growth control ordinance. Torromeo is the developer of a twenty-seven lot residential subdivision know as Mason's Corner. After all but five lots were sold, the town stopped issuing building permits under its newly enacted growth control ordinance. Torromeo and a prospective purchaser of sued the town, seeking to require it to issue a building permit to the buyer. The trial court ruled that the subdivision was exempt from the growth control ordinance under the "grandfathering" provisions of RSA 674:39 and ordered the town to issue the building permit.

MDR is the developer of a fourteen lot subdivision and was originally issued five building permits, but was later informed that under the growth control ordinance no more permits could be issued for quite some time. MDR also sued the town, arguing that the growth control ordinance was invalid because the town had never legally adopted a capital improvement program (CIP), which is a prerequisite to the adoption of a growth control ordinance under RSA 674:22. The trial court agreed that the town had never validly adopted the growth control ordinance, and the supreme court had upheld that ruling in an earlier case.

Following their successful attacks on the town's growth control ordinance, Torromeo and MDR filed separate lawsuits against the town seeking money damages caused by the "temporary taking" of their property from the time building permits had been denied under the invalid growth control ordinance until the permits were finally issued. The town argued that money damages for a temporary taking could only be awarded if the plaintiffs had shown that the growth control ordinance was unconstitutional, not merely unenforceable. After some confusing legal maneuvers, the superior court agreed with the plaintiffs and awarded them a substantial amount of money damages.

The town appealed to the supreme court, which reversed the award of money damages. The court clarified some language in an earlier case by ruling that money damages are only available to a plaintiff where the ordinance at issue is found to be unconstitutional and constitutes a taking (temporary or permanent) of the plaintiff's property. If the ordinance is merely invalid for some reason, and therefore unenforceable, as was Fremont's growth control ordinance, the only remedy the successful landowner is entitled to is an order forcing the town to issue the erroneously-denied building permits.

ZBA CANNOT GRANT A SPECIAL EXCEPTION IN THE HOPE THAT THE PLANNING BOARD WILL CLEAN UP THE MESS!!

Tidd v. Town of Alton, _____ N.H. _____ (October 11, 2002)

The Holts own a forty-four acre tract of land located in a rural zoning district along County Road in Alton. After denying two previous applications, the ZBA approved a third application for a special exception to allow the Holts to develop a campground on the property with 100 campsites, and the angry abutters appealed. The superior court reversed the ZBA's approval and the supreme court agreed with that result.

In order to grant a special exception under the Alton Zoning Ordinance, the ZBA was required to find that the applicant meets several conditions including the following two:

> There is no undue nuisance or serious hazard to pedestrian or vehicular traffic, including the location and design of access ways and off-street parking.
>
> The proposed use or structure is consistent with the spirit of this ordinance and the intent of the Master Plan.

The supreme court repeated the rule that in considering whether to grant a special exception, zoning boards may not vary or waive any of the requirements set forth in the zoning ordinance -- also, there must be sufficient evidence before the ZBA to support favorable findings on all of those requirements.

In this case, the record showed that the ZBA received testimony that the proposed campground would create serious traffic hazards that could only be resolved if the planning board and/or the NHDOT acted by taking land, redesigning the intersection and pruning some trees and brush. Because of these unresolved traffic hazards, the superior court also concluded that the plan would not promote the public health, safety and general welfare as required by the zoning ordinance, and thus would not be consistent with the spirit of the ordinance.

The supreme court agreed, holding that "by granting the special exception in the face of serious traffic hazards, the ZBA unlawfully waived or varied the conditions [for special exception] of the zoning ordinance."

APPEAL FROM PLANNING BOARD'S INTERPRETATION OF THE ZONING ORDINANCE MUST FIRST GO TO THE ZBA

Heartz v. City of Concord, _____ N.H. _____ (September 17, 2002)

The complicated facts of this case are not important to our understanding of the rule that comes out of it. The supreme court interpreted the provisions of RSA 676:5, III, which gives the ZBA authority to review the planning board's interpretation of the zoning ordinance, as being mandatory in order to preserve the right to appeal to court.

In other words, if an applicant or abutter is not happy with the planning board's interpretation of the zoning ordinance in the course of its review of a subdivision or site plan application, that unhappy person MUST first appeal that portion of the planning board's decision to the ZBA in order to preserve their rights to eventually seek court review. If the unhappy person DOES NOT first appeal to the ZBA, she gives up her right to bring the zoning portion of the matter to court.

PRACTICE POINTER: Frequently, the planning board's final decision on a complex subdivision or site plan application will include within it the planning board's determination of how the zoning ordinance applies to the proposal, and how the planning board's subdivision and/or site plan regulations should be interpreted and applied to the project. (See *Hoffman v. Town of Gilford*, 147 N.H. 85 (2001), a case which foreshadowed the result of *Heartz* case). Under the state of the law after *Heartz*, to preserve their rights the unhappy party must first appeal the purely "zoning" questions to the ZBA under RSA 676:5, III while at the same time appealing the "planning" issues (those arising from the application of the subdivision and site plan regulations) directly to the superior court under RSA 677:15! In such a case, the superior court would no doubt be willing to put a hold on any proceedings in the direct appeal from the planning board until the zoning issues either were resolved once and for all at the ZBA, or also came up on appeal from the ZBA where they could then be consolidated with the direct appeal from the planning board and tried at the same time. Awkward.

This split appeal process is what is classically referred to in law schools as "a trap for the unwary," and will no doubt be the source of grief in the future. It doesn't have to be this way. When the legislature amended the statutes to give the ZBA an opportunity to review disputes about the planning board's interpretation of the zoning ordinance, it could not know that the court would eventually interpret that appeal process to be mandatory. The legislature is free to tinker with the process if it does not approve of the post-*Heartz* world we are at least temporarily inhabiting!

TOWN MAY APPLY GROWTH CONTROL ORDINANCE UNLESS IMPACT FEES ALREADY PAID OR ASSESSED

Monahan-Fortin Properties, LLC v. Town of Hudson (December 24, 2002)

This case involves the court's interpretation of RSA 674:21, V(h) which states:

> "The adoption of a growth management limitation or moratorium by a municipality shall not affect any development with respect to which an impact fee has been paid or assessed as part of the approval for that development." (emphasis added.)

The developer/plaintiff sought approval to construct a 101-unit elderly housing condominium known as Riverwalk along the Merrimack River in Hudson. When the developer filed its site plan application the town already had an impact fee ordinance in place, but there was a dispute about whether the application would be exempt from a newly proposed growth management ordinance. Although the developer and the town battled about whether the site plan should have been (or was in fact) formally accepted by the planning board as complete before the first public notice of the growth management ordinance was published, the superior court ruled that the development was exempt from the growth control ordinance under the above quoted statute because impact fees "would inevitably be assessed or had, in fact, been assessed against the plaintiff." This point was the only issue appealed to the supreme court, and based on the plain language of the statute it disagreed with the lower court.

The record was clear that the developer had not actually paid an impact fee, so it couldn't fit into that part of the statute. However, in its site plan application the developer stated the specific amount of the impact fees it would have to pay under the town's ordinance, and the town acknowledged that it had preliminarily calculated the amount of the impact fees that were to be charged to the project. The superior court held that the statute was satisfied because it seemed "inevitable" that the developer would end up having to pay the impact fee, and therefore concluded that an impact fee had been "assessed." As a result, it ruled that the town could not also apply its growth control ordinance to the project.

The supreme court disagreed, although it declined to precisely define the meaning of "assessed" in this context. Instead, the court said that it was sufficient to state that

> "a preliminary estimate of an impact fee by a municipality does not constitute an assessment within the meaning of the statute, and that a municipality does not assess fees implicitly by merely receiving an application wherein fees are represented."

Instead, the supreme court said the plain language of the statute should have been followed by the superior court: since an impact had not already been paid or assessed (past tense) when the growth control ordinance came along, the town could apply both impact fees and growth control restrictions to the development.

BOARD OF SELECTMEN IS THE ONLY TOWN BOARD THAT CAN APPEAL A ZBA DECISION TO SUPERIOR COURT

Hooksett Conservation Commission v. Hooksett Zoning Board of Adjustment, _____ N.H. _____ (January 23, 2003)

Well, it finally happened. Many of us were waiting for a case like this to come along to clear up an uncertainty in the statutes about which town boards or officials have authority to pursue an appeal of a ZBA decision to the courts.

In July, 2000 the Hooksett Conservation Commission reviewed an application for site plan approval submitted to the planning board for a convenience store and retail gasoline sales facility. The commission provided a memo to the planning board stating its determination that the zoning ordinance prohibits "automobile service or repair shops" in the proposed location. The planning board sought an interpretation of the zoning ordinance from the town's code enforcement officer, who then issued a formal zoning interpretation in which he concluded that the proposed use is permitted under the zoning ordinance. The conservation commission appealed the CEO's formal interpretation to the ZBA under RSA 676:5, and the ZBA upheld the CEO's ruling that the use is permitted. The conservation commission then filed a request for rehearing with the ZBA under RSA 677:2 which was denied, and then appealed the ZBA's decision to superior court under RSA 677:4.

The ZBA filed a motion to dismiss the appeal, arguing that the conservation commission had no authority to appeal to the court (had no "standing" to bring the case to the court) under the language of RSA 677:4. The superior court denied the ZBA's motion to dismiss and then ultimately issued an order agreeing with the conservation commission that the proposed use was prohibited in that location under the zoning ordinance. The ZBA then appealed to the supreme court.

To make a long story short, after a lot of comparison of the history of changes to the three relevant statutes and a consideration of the policy issues involved, the supreme court ruled that the conservation commission could file an appeal with the ZBA in the first instance, but is not allowed to apply for a rehearing to the ZBA if it gets an answer it doesn't like, and is not allowed to take the issue to the courts. The supreme court ruled that under the statutes, only the selectmen are clearly given the authority to not only appeal to the ZBA in the first place, but then to file for a rehearing with the ZBA if the selectmen are not happy with the ruling and then take an appeal to the courts if the ZBA sticks to its original result.

The supreme court reached this result because although RSA 676:5, I permits "any person aggrieved or . . . any officer department, board or bureau of the municipality affected by any decision of the administrative officer" to appeal the initial zoning determination to the ZBA, the language of RSA 677:2 and RSA 677:4 which govern the process after that is not so clear. Instead, RSA 677:2 says that "the selectmen, any party to the action or proceedings, or any person directly affected thereby" may file for a rehearing with the ZBA, and RSA 677:4 allows "any person aggrieved" (which includes "any party entitled to request a rehearing under RSA 677:2") to appeal to the superior court. The supreme court ruled that the legislature did not intend to include town boards or officials within the definition of who is a "party" under RSA 677:2 with a right to pursue the matter.

The supreme court really had to struggle with this one, because neither the long legislative history of changes to the statutes, nor the current language of the statutes provides a clear answer to the question. To provide that answer, the court considered the policies sought to be advanced by the appeal process, and became "persuaded that the legislature did not intend for all municipal boards to have standing to move for rehearing and to appeal the ZBA's decision to the superior court." In support of that conclusion the court wrote the following (case citations, ellipsis and quotation marks omitted):

> The policy considerations stem from the fact that there are undoubtedly many instances when a municipal board may disagree with a ZBA's interpretation of a zoning ordinance. If municipal boards were permitted to appeal in every such instance, the prompt and orderly review of land use applications would essentially grind to a halt. Suits by different municipal boards could cause considerable delays and thus unfairly victimize property owners, particularly when no party directly affected by the action such as abutters has seen fit to challenge the application. Public funds will also be drawn upon to pay the legal fees of both contestants, even though the public's interest will not necessarily be served by the litigation. Finally, to permit contests among governmental units is to invite confusion in government and a diversion of public funds from the purposes for which they were entrusted. Practical politics being what they are, one can readily foresee lively wrangling among governmental units if each may mount against the other assaults. Such wrangling among governmental units should be minimized. In light of the above policy considerations, we conclude that the legislature did not intend to grant standing to request a rehearing to all municipal boards that may initiate an appeal under RSA 676:5.

Of course, the legislature is free to amend the appeal statutes in light of this decision, and the supreme court respectfully invited the legislature to do so if it believes the court misinterpreted the legislature's intent.

ZBA WASN'T CLEAR ABOUT WHICH VARIANCE TESTS WERE NOT MET, AND THE SUPERIOR COURT WASN'T CLEAR ABOUT APPEAL REQUIREMENTS!!

Robinson v. Town of Hudson, _____ N.H. _____ (March 14, 2003)

This most confusing case started out simply enough. Michelle Robinson owns an old subdivision lot on Mark Street in Hudson that was approved in 1970. Because the planned road improvements were never done, Robinson's lot has only 50 feet of road frontage instead of the 150 feet required under the zoning ordinance. Robinson applied

for a variance from the frontage requirement, which the ZBA denied. The ZBA's Notice of Disapproval specifically found that she failed to meet two of the five conditions for a variance (#1 - the variance would not be contrary to the public interest, and #2 - substantial justice would not be done) (see RSA 676:3, which requires both the ZBA and the planning board to issue written decisions -- if the decision is a denial, the reasons for the denial have to be spelled out in the written decision).

The superior court denied Robinson's appeal on the grounds that she did not challenge the ZBA's decision on all five of the variance grounds when she filed her motion for rehearing with the ZBA!! The supreme court ruled (correctly) that RSA 677:3 does not place a burden on an applicant to raise in a motion to reconsider variance conditions that were not specifically denied by the ZBA.

The town tried to argue that the ZBA did base its denial on each and every one of the five variance conditions, but based on the evidence the supreme court said

> ". . . the evidence presented is insufficient to demonstrate that the ZBA concluded that the petitioner did not meet any of the variance conditions. The worksheet of one member is missing from the record and the remaining worksheets contain votes that are neither unanimous nor clear. The worksheets and minutes are inconclusive as to the findings of the ZBA. As such, the record does not support the trial court's finding that the petitioner failed to meet any of the five conditions for granting a variance."

Because the premise for the superior court's ruling dismissing Robinson's appeal was legally incorrect (the faulty requirement that her motion for rehearing to the ZBA had to include all five variance conditions even if the ZBA's denial was based on less than all five), the supreme court reversed the dismissal and sent the case back down to the superior court.

Practice Pointer: Although the superior court didn't help things, most of the confusion in this case does seem to arise from unclear records of the ZBA's actions. It can't be emphasized too strongly that both the ZBA and the planning board must strive to create a clear record of what was decided, supported by a description of what facts were found by the board to support each decision!

SUPREME COURT MISINTERPRETS RSA 674:21-- MUNICIPALITY MUST ADOPT AN IMPACT FEE ORDINANCE BEFORE PLANNING BOARD CAN REQUIRE OFF-SITE IMPROVEMENTS

***Simonsen v. Town of Derry*,** 145 N.H. 382 (2000)

The facts are simple. The plaintiffs own and operate a camp in Derry containing a private nine-hole golf course. In 1997, they sought site plan approval to add an additional nine holes and to open the course to the public. The planning board

approved the plan, contingent upon payment of $7,500 for off-site improvements necessitated by increased traffic.

The plaintiffs appealed to superior court, challenging the authority of the planning board to require them to pay for the off-site improvements. In a stunningly wrong-headed decision, the supreme court agreed with the superior court that unless the town adopts an impact fee ordinance as allowed under RSA 674:21, I(m) the planning board lacks authority to require off-site improvements as a condition of either site plan or subdivision approval!

As background, recall that in several clearly written decisions issued before 1991, the supreme court declared that in the exercise of both subdivision and site plan authority planning boards may require a developer to pay for or actually construct off-site improvements to the extent those improvements are made necessary by and would specially benefit the proposed development (the "rational nexus" test); such impact fees were assessed by planning boards on a case-by-case basis in light of the specific facts of each application, and did not depend on the existence of a local impact fee ordinance. As a result of this well understood approach, many municipalities did not bother to adopt a formal impact fee ordinance (which also requires that there be a capital improvements program in place -- see RSA 674:21, V(b)).

Inexplicably, when the *Simonsen* case landed on its desk the court looked at RSA 674:21, V(i), passed in 1991, which states that "the failure to adopt [an impact fee ordinance] shall [not] be deemed to affect the existing authority of a planning board over subdivision or site plan review" and then ruled that the statute meant exactly the opposite of what it says in plain language! The court found that by enacting that statute the legislature had intended to impose a uniform, comprehensive regulation of impact fees that first requires the town to adopt an impact fee ordinance! Good grief!

Effective Response: The most effective response is, of course, for each municipality to adopt an impact fee ordinance (but first a capital improvements program if that has not yet been done!).

For a variety of reasons, including the fact that an impact fee ordinance is legally classified as a zoning ordinance and must be adopted using the same procedures as for a zoning ordinance, some communities may not want to adopt such an ordinance, or the big subdivision or site plan development that will have far reaching off-site impacts may come along before the impact fee ordinance has been adopted or even formally proposed. Can ***anything*** be done about off-site improvements without an impact fee ordinance??

Well, maybe. It seems clear that planning boards still have the authority to deny applications for subdivision approval under RSA 674:36, II(a) where the development as proposed would be "scattered or premature" because it involves danger or injury to health, safety, or prosperity because of inadequate public infrastructure or would require the excessive expenditure of public funds to provide that infrastructure. Similar authority is inherent in the permissible scope of site plan regulations under RSA 674:44,

II. It therefore seems perfectly legal for the planning board to take the view that a particular application must be denied where off-site improvements are required to avoid a public health or safety problem; in a given case, the board might actually go so far as to vote to deny the application, without prejudice, because of those off-site inadequacies. Such a "without prejudice" denial would leave the applicant free to revive the application with a proposal to voluntarily provide the needed off-site improvements. If the applicant wishes to avoid a denial by *voluntarily* agreeing to pay for or actually build the off-site improvements, everyone gets what they want and no harm is done. As before, however, the best solution is to adopt an impact fee ordinance and be done with it.

LIMITATION ON AREA SUBJECT TO VARIANCE AND SPECIAL EXCEPTION MUST BE CLEARLY STATED TO BE ENFORCEABLE

North Country Environmental Services, Inc. v. Town of Bethlehem, 146 N.H. 348 (2001)

This case arose from the latest in a series of disputes between successive owners of a solid waste landfill in Bethlehem on one hand and the town and concerned citizens on the other. Although the facts and the law involved in the court's decision are complex and peculiar to the situation in Bethlehem, there is one guiding principle that comes out of the decision that offers instruction to all of us who are connected in any way with planning and zoning matters; that principle is: the need to strive for clarity in the use of the English language. Clarity most often results from the expression of simple concepts using simple words. Let's see how failure to follow that principle determined the basic outcome of this case.

Harold Brown owned an 87 acre parcel in Bethlehem. In 1976 he received a variance to operate a landfill, and obtained State approval for the landfill within a four acre footprint on the property. In 1977 the State allowed him to expand the footprint by about an acre; Mr. Brown did not seek any further town approval for that expansion.

In 1983, Mr. Brown received planning board approval for a ten acre subdivision for landfill use, then sold the lot to Sanco, Inc. In 1985, Mr. Brown got approval to subdivide an additional 41 acres for landfill use, and also sold that lot to Sanco.

In 1985-1986, Sanco received a special exception to expand the existing landfill onto the 41 acre parcel. Over the next few years, Sanco received permission from the State to expand the landfill in two stages and several phases, and then sold the entire property to North Country Environmental Services, Inc. ("NCES").

In 1999, the town petitioned the superior court to stop the expansion of the landfill under the State permits, alleging among other things that the expansion was an unlawful expansion of a nonconforming use in violation of the 1976 variance; NCES also filed a petition with the court, asking it to declare that it has the right to gradually expand the landfill onto the entire 87 acres.

The town argued that the 1976 variance contained a limit on the area that the landfill could occupy on the 10 acre parcel. The supreme court agreed with the superior court that the variance contained no such limitation, and pointed out that "the scope of a variance is dependent upon the representations of the applicant and the intent of the language in the variance at the time it is issued." (quoting *Dahar v. Department of Bldgs*., 116 N.H. 122, 123 (1976)). The court found there was simply no language in the variance which expressly limited the area to be used for landfilling, and the ZBA's notice of decision to Mr. Brown simply states that the variance request is "granted and approved, subject to complete state approval and subsequent supervision." Also, although the variance application contained a "crude map" showing the proposed landfill's approximate location, it contained no statement of the landfill's expected dimensions. Although the town argued that a limit on the size of the landfill should be *implied* by the reference to the need for future State approval and supervision, the court did not agree that any such implication was strong enough to be enforceable against the landowner.

The town also argued that the 1985-1986 special exception regarding the 41 acre parcel should also be interpreted to contain a limitation on the size of the landfilling that could occur there. As with the variance, there was simply no express limitation contained in the grant of the special exception, and the evidence in support of some *implied* limitation was just too flimsy.

Lesson: If the ZBA had intended to limit the size of the landfill that could be constructed under the variance, it could have easily done so using simple words, and by requiring the limited area to be shown on a plan that was then clearly incorporated as part of the grant of the variance.

When we sit as land us board members, it is helpful to step back for a minute and try to imagine what questions about the proposed use might come up years in the future, and then try to find clear answers to those questions in the material that is before the board, or being generated by it in the form of minutes, lists of conditions, draft notices of decision and so forth. If there isn't a clear answer to the question in the record, that's a gap that can and should be filled before final approval is granted!

FORMER ACCESSORY USE NOT ALLOWED TO BECOME THE PRINCIPAL NONCONFORMING USE (OR, DON'T GIVE UP THE PIGS!!)

Town of Salem v. Wickson, 146 N.H. 328 (2001)

Richard Wickson owns a 4.1 acre vacant lot in Salem that had been used as a working farm, including pigs, since the 1950's; the farming use became nonconforming when the town's first zoning ordinance was adopted in 1961.

As part of the farming activities, horse, chicken and pig manure were stockpiled, and sand and other materials were brought onto the site to be mixed with the manure;

this material was then trucked off the property to market. In 1988, Wickson voluntarily removed the animals and buildings and ceased the farming operation with the intention of establishing a nursery for which he had received site plan approval, but the nursery was never built. It does not seem to have been disputed that Wickson voluntarily abandoned the principal, nonconforming use of farming; see *Lawlor v. Town of Salem*, 116 N.H. 61 (1976) for a discussion of how to evaluate whether a nonconforming use has been abandoned.

Instead, Wickson continued to use the lot to stockpile earth materials, involving the delivery of some twenty-five eighteen-wheel truckloads per week. In 1990 the town notified him that the stockpiling was not a permitted use, and eventually filed a petition in the superior court seeking an injunction against the use. After a two day trial, the superior court judge dismissed the town's petition, ruling that the use of the property for stockpiling had been continuous and essentially unchanged since the 1950's and was therefore a lawful, nonconforming use.

On appeal, the town argued that when Wickson abandoned the nonconforming farming use of the property, he also abandoned all nonconforming uses incidental to pig farming, including his right to stockpile earth materials; therefore, the continued stockpiling constitutes a substantial change in use. Wickson argued that to determine whether a substantial change in the nonconforming use had taken place, the superior court correctly focused on the consistency of the stockpiling activity, and not whether that activity was incidental to the farming operation that had been abandoned; that is, Wickson argued that no change had occurred because the stockpiling activity still consisted of manure being mixed with earth products for commercial sale just as when the farm existed.

Tests to Evaluate Whether Change to Nonconforming Use is Allowed

In its analysis, the supreme court first repeated the approach set out in earlier cases that to determine whether there has been a substantial change in the nature or purpose of the pre-existing nonconforming use, which is not allowed (unless the local zoning ordinance says otherwise) the court will consider:

(1) the extent the challenged use reflects the nature and purpose of the prevailing nonconforming use;

(2) whether the challenged use is merely a different manner of utilizing the same use or constitutes a use different in character, nature, and kind; and

(3) whether the challenged use will have a substantially different effect on the neighborhood.

So, the first task is to determine the nature and purpose of the use that was in place *when the zoning ordinance went into effect* (always the "magic moment" in this part of the analysis). The court concluded that "the nature and purpose of the

nonconforming use in 1961 was for pig farming and that the stockpiling activity was incidental and subordinate to the farming activity." (As shorthand, this finding is the equivalent of a finding that the stockpiling was an "accessory" use in support of the principal use of farming.) The court noted that the courts in some other States have adopted a firm rule that a nonconforming use that is accessory to a principal use *can never be converted* to a principal nonconforming use, but declined to consider adopting that hard and fast rule on the technicality that the town had not argued that the rule should be adopted when the case was before the superior court.

Because it refused to adopt the hard and fast rule (but did it, really?? -- see below!), the court went on to consider whether Mr. Wickson's revised stockpiling activity constitutes a use different in character, nature and kind. The court ruled that it does, observing that at the time the zoning ordinance was adopted in 1961 earth materials were brought onto the lot and stockpiled to assist in removing a by-product of the principal pig-farming activity -- *the character and nature of the stockpiling after the farming was abandoned is wholly unrelated to pig farming, and all materials are brought in from off-site*. Therefore, the supreme court rejected the superior court's finding that the use had remained essentially unchanged since before zoning was adopted.

The heart of the case lies in the court's disagreement with Mr. Wickson's argument that any use that is "similar" to the nonconforming use for stockpiling is a natural expansion of that nonconforming use, since the argument "misconstrues the purpose of the right to continue a pre-existing lawful use." The court went on to explain:

> The right to continue a pre-existing lawful use vests in the property because a substantial reliance has been placed on that use . . . *at the time* the ordinance creating the nonconforming use us enacted. Accordingly, nonconforming uses may be expanded, where the expansion is a natural activity, closely related to the manner in which a piece of property is used at the time of the enactment of the ordinance creating the nonconforming use. Here, any claim that substantial reliance had been placed upon the use of the lot for stockpiling was directly related to the nonconforming use of the property as a pig farm. The fact that the stockpiling activity of mixing manure with earthen materials has continued without interruption is irrelevant, because *the right that vested with the property was to continue pig farming*. Therefore, *unless the stockpiling is closely related to the pig farming, it is not the expansion of a natural activity closely related to the nonconforming use*.

The court went on to find that the stockpiling also flunked the third part of the test, since the use does have a substantially different effect on the neighborhood ("it is inconceivable that sixty-five pigs could create enough waste to require anywhere near the twenty-five eighteen-wheel truckloads per week involved in the new stockpiling operation"). However, that finding was not critical to its decision, and is an anticlimax.

When Is a Firm Rule Not a Firm Rule??

Although the court said it would not adopt a "firm rule" that an accessory use can never be converted to a principal nonconforming use as the town had requested, the practical effect of its decision may amount to the same thing. The court was unequivocal that "*the right that vested with the property was to continue pig farming*," which was the principal use of the property that became nonconforming the moment the zoning ordinance was adopted in 1961. Since the principal use was later abandoned, the new stockpiling activity could not be "the expansion of a natural activity closely related to" pig farming because there is no more pig farming. Therefore, how could a use that was accessory to a former nonconforming use that was then discontinued *ever* be allowed as a substitute, principal nonconforming use of the property?? It seems logically impossible, because the former accessory use will never be able to claim that it is still closely related to the former principal use. Sure seems like a firm rule to me!!

DO NOT FORGET TO CERTIFY SUBDIVISION AMENDMENTS AND FILE THEM WITH THE TOWN CLERK!! -- IN THIS CASE, EVEN THOUGH IT DIDN'T COMPLY WITH NEW SUBDIVISION RULE, APPLICATION SHOULD HAVE BEEN ACCEPTED BY PLANNING BOARD

Rallis v. Town of Hampton Planning Board,
146 N.H. 18 (2001)

Mr. Rallis proposed a six-lot subdivision that included a road which abutted two lots in an adjoining subdivision that already had frontage on an existing road. The proposed design therefore created two "double-fronted" lots, i.e., lots abutted by roads at the front and rear property lines. After several contacts with the planning board and the town's circuit rider planner about the content of his subdivision application, Mr. Rallis submitted the application and filing fee to the planning board on **September 16, 1997**.

Earlier, on **September 4**, the planning board had posted notice of a public hearing for a proposed amendment to the subdivision regulations that prohibited subdivision roads that created double-fronted lots like the two in Mr. Rallis's application. The same notice of public hearing was published in the newspaper on **September 5**.

At the public hearing on **September 17** the planning board voted to approve the amendment, but it did not certify the amendment until **October 1** and did not file the required certification with the town clerk (see RSA 675:6, III) until **October 2**.

At its hearing on **October 1**, the planning board voted not to accept jurisdiction of the subdivision application because it:

(1) did not include written waiver requests for the double-fronted lots; and

(2) presented too many design issues "which ultimately could be reconfigured and submitted at a later date."

Mr. Rallis appealed to superior court, which ruled that the planning board should have accepted the application. The town appealed, and the supreme court agreed with the superior court.

Subdivision Amendment Not Effective Until it Is Certified And Filed With Town Clerk

On appeal, the town first argued that the subdivision amendment became effective on **September 4** or **September 5**, the date of the first published notice, under the provisions of RSA 676:12, I, V. Because the application submitted on **September 16** contained plans for double-fronted lots in violation of the amendment, the planning board argued that it properly declined to accept jurisdiction. The supreme court disagreed, pointing out that under RSA 675:6, III the amendment did not legally become effective until it was certified by the planning board and filed with the town clerk. Thus, the supreme court drew a distinction between the effect of the two statutes, and a corresponding distinction "between a planning board taking jurisdiction over an application, which is at issue here, and formal consideration of an application *after accepting jurisdiction*." (emphasis added.)

In other words, the supreme court agreed that Mr. Rallis's application was subject to the new amendment, because the application was not formally accepted by the planning board prior to the first legal notice of the amendment. However, the court said that RSA 676:12, V cannot be relied upon by the planning board to deny jurisdiction over the application, since the application had not taken legal effect when the board voted to decline jurisdiction.

Important Point: I think the most important issue to be highlighted in this case is the fact that neither the subdivision regulations themselves nor any amendment to them are legally effective until a copy has been certified by a majority of the planning board and filed with the town clerk as required under RSA 675:6, III. (***Note: The same statute also applies to site plan regulations, so the same rules apply to the site plan process!!***)

That is not a mere request, it is a fundamental requirement that might well determine the outcome of litigation over the denial of a subdivision application and leave a town, at least temporarily, without any enforceable subdivision regulations at all!! It might be worth checking with your town clerk to see if the regulations and any amendments have been properly certified and filed. If the town clerk can't find them, you best assume it hasn't been done and touch base with your town counsel about what action to take!!

Offer to Revise Subdivision Plan Does Not Make it Incomplete

The town also argued that the applicant's offer to revise or redesign the plan to satisfy various planning board concerns, after submitting the application, rendered the application "incomplete." The supreme court disagreed.

Under RSA 676:4, I(b) a "completed application means that sufficient information is included or submitted to allow the board to proceed with consideration and to make an informed decision." The court pointed out that the plaintiff's application included detailed subdivision plans and the other items required by the subdivision regulations. Thus, the court ruled, the application was sufficiently complete for the board to exercise jurisdiction over it; the fact that the plan might be revised as it went through public hearing and planning board review does not render it "incomplete" at the time it is submitted for formal acceptance.

Practice Pointer: Understandably, planning boards sometimes get frustrated with the changes that must be made to a subdivision plan to get it to the point where the legitimate planning concerns are addressed; we sometimes hear comments like: "We're not here to design your project for you!!" I think this case stands for the notion that within very broad limits, it is the job of the planning board to work with applicants to make the changes that are needed to eliminate planning concerns. The fact that the proposal is not perfect when it comes in the door is not ground to refuse to accept it, or refuse to work the plan through the process.

PLAINTIFF MUST PROVE THAT DISCRIMINATORY ENFORCEMENT OF ZONING ORDINANCE WAS CONSCIOUS AND INTENTIONAL; SOME INTENSIFICATIONS OF NONCONFORMING USES ARE ALLOWED AS A MATTER OF RIGHT

Pope v. Little Boar's Head District, 145 N.H. 531 (2000)

The plaintiff owns a small ice cream stand, the Beach Plum, in the Little Boar's Head District of the Town of North Hampton. Established before the area was zoned residential in 1937, the operation was closed during World War II, and re-established under a conditional variance in 1946. The conditional variance restricted items sold from the stand to principally products of the owner's dairy, and only for the retail sale of his ice cream, cream, milk, buttermilk, frappes, and other dairy products, hot dogs, tonics, candy, popcorn, potato chips, peanuts, cigarettes, cigars, and chewing gum.

Interestingly, there is a small restaurant located just a few hundred yards from the Beach Plum, called Andrews-by-the Sea; in 1992 the District Board of Commissioners, after an "informal" meeting (!!!), granted Andrews-by-the Sea a one-year permit for a take-out window. Then, in a 1993 letter, the building inspector and commissioner, without conducting a hearing (!!!), gave Andrews-by-the Sea permission to operate the take-out window permanently.

In 1996, Mr. Pope, the latest owner of the Beach Plum, applied for a special exception under the zoning ordinance to expand his menu items to include coffee, tea, hot chocolate, hamburgers, cheeseburgers, muffins, doughnuts, pastries, and cold sandwiches. *He did not seek to make any physical alteration to the building*, but claimed that he was seeking to intensify his nonconforming use. The special exception was denied, which was particularly unsettling to Mr. Pope in light of the easy time his competition had at Andrews-by-the Sea.

Mr. Pope appealed the denial of the special exception to superior court, alleging that (1) it is unlawful for the District to not have a provision in its zoning ordinance so that a property owner can receive permission to intensify, as opposed to expand physically, a nonconforming use; and (2) the District applied the zoning ordinance in a discriminatory manner because of the way it allowed his competitor, Andrews-by-the Sea, to install a take-out window. The superior court judge was so upset about what seemed to him to be blatant discrimination that the never ruled on the first argument. Instead, the judge found that the District had enforced the zoning ordinance in a discriminatory manner, and ordered it to either allow the expanded sales requested by Mr. Pope, or enforce its ordinance against all businesses similarly situated and in direct competition with Mr. Pope. The District appealed to the supreme court.

On appeal, the supreme court stated flatly that a finding that a municipality selectively enforced its zoning ordinance in a discriminatory manner requires evidence that any discrimination was *conscious and intentional*. Although that is an incredibly hard thing to prove, it seems an appropriate burden to avoid a situation where good faith, but uneven or negligent, enforcement decisions could allow similarly situated property owners to simply ignore the ordinance. Certainly such a result would not be in the public interest and it is for that reason that the court has justifiably set the bar in a very high place when a plaintiff claims discrimination. Because the superior court did not consider whether any discrimination was conscious and intentional, the supreme court remanded the case (sent it back down to the superior court) for further proceedings.

Nonconforming Use v. Use Allowed by Variance

The poor old much-maligned supreme court had its eyes wide open on this one! It went on to point out that although everybody was arguing about the Beach Plum being a pre-existing nonconforming use, it seemed to the court that it really is a use established (or at least re-established) after zoning was adopted by virtue of the conditional variance that was granted in 1946. As such, perhaps Mr. Pope should have sought a modification of the conditions placed on his variance, rather than seeking a special exception under the ordinance. In this regard, the supreme court recognized the authority of the ZBA "to modify conditions previously imposed with respect to the grant of a variance."

Intensification of Nonconforming Use as a Matter of Right

The supreme court also pointed out that if Andrews-by-the Sea is a nonconforming use, the addition of the take-out window that seems so improper because permission for it was granted without any public proceedings may have been permissible as a matter of right. That is so because it is the law that a property owner who seeks to expand or "intensify" a nonconforming use internally may do so as a matter of right if the intensification will not result in a substantial change to the effect of the use on the neighborhood. See *Ray's Stateline Market, Inc. v. Town of Pelham*, 140 N.H. 139 (1995). Thus, on remand the superior court should also consider whether the uproar

about the different treatment afforded Andrews-by-the Sea was merely a tempest in a teapot.

TEST FOR EXPANSION OF A NONCONFORMING USE IS MORE RESTRICTIVE THAN THE TEST FOR "CHANGE OF USE" FOR SITE PLAN REVIEW

Town of Seabrook v. Vachon Management, Inc., 144 N.H. 662 (2000)

In 1990, the defendants opened a business known as "Leather and Lace" in unit one of a six unit building on Route 1 in Seabrook - the business sold adult books, magazines, videotapes, and paraphernalia and later installed coin-operated video booths. The adjacent unit, unit two, was occupied by a third party who used it for retail computer equipment sales. For some time, Leather and Lace also presented live entertainment in unit one, including mud and oil wrestling, but that activity stopped in unit one after the town's building inspector informed the owner that the addition of live entertainment would require site plan approval from the planning board since it constituted a change of use from retail sales.

In fact, as soon as the computer sales operation moved out of unit two in 1992, Leather and Lace expanded into it without notice to the town, and began offering mud wrestling and bachelor parties. Eventually, part of the wall separating the two units was removed, and live nude dancing was substituted for the mud wrestling and bachelor parties in unit two.

In 1994 the Town of Seabrook amended its zoning ordinance to regulate sexually oriented businesses; the regulations prohibit any such business from operating within 1,000 feet of a place of worship, 300 feet of a residence, or 500 feet of the town boundaries. Leather and Lace violated the new restrictions by virtue of its proximity to the town border, a residence and a church.

In 1997 the town discovered that unit two was being used for live nude dancing and sought an injunction in superior court to stop it. Following a trial, the superior court denied the injunction, finding that mud wrestling was a preexisting nonconforming use that was unaffected by the 1994 zoning amendment, and implicitly concluding that live nude dancing was a lawful expansion of mud wrestling.

The supreme court reversed, agreeing with the town that live nude dancing in unit two is not exempt from the 1994 ordinance as a grandfathered use. The key to the decision is that only *lawful* preexisting uses are protected from later enacted zoning restrictions, so that they may continue as nonconforming uses. When unit two was changed from computer sales to mud wrestling in 1992, it was a change of use from "retail" to "commercial entertainment" under the ordinance at the time. In order to be lawful, the owner was required to seek and receive site plan approval for the change from the planning board. Since the owner never applied for site plan approval, mud wrestling was never lawfully established and therefore neither it nor the later addition of

live nude dancing were protected from the restrictions imposed by the 1994 sexually oriented business amendment.

The court went on to provide clarification as to when a change of use is sufficient to trigger the need for site plan review. The defendants argued that in order to require site plan approval, the change in use must be substantial, a test similar to that used to determine if an expansion of a lawful nonconforming use is permitted. The court disagreed, ruling that

> the purpose of requiring site plan approval is to assure that sites will be developed in a safe and attractive manner and in a way that will not involve danger or injury to the health, safety or prosperity of abutting property owners or the general public. If a town is not permitted to review site plans for all changes in use, it will be unable to measure the impact of such changes on the existing infrastructure and site conditions to protect the public health, safety, and welfare.

Warning: Do not confuse the court's ruling that all changes of use are subject to site plan review (assuming, of course, that the new use is either multi-family or nonresidential as provided under RSA 674:43, I) with the incorrect idea that ***any*** change to an ***existing use*** is subject to site plan review. The court's ruling does not address ***expansion of an existing use***, such as adding a table or two to an existing restaurant. It merely states that when a restaurant changes to, say, retail sales, site plan review is required even if the owner argues that the changed use is not substantially different from the existing use, or that the impact on the surrounding properties, traffic patterns and the like will not change.
